

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
	)	
Standardized and Enhanced Disclosure	)	MM Docket No. 00-168
Requirements for Television Broadcast	)	
Licensee Public Interest Obligations	)	
	)	
Extension of the Filing Requirement	)	MM Docket No. 00-44
For Children's Television Programming	)	
Report (FCC Form 398)	)	
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	)	

**REPLY COMMENTS  
OF THE PUBLIC INTEREST PUBLIC AIRWAVES COALITION**

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## **SUMMARY**

The Public Interest Public Airwaves Coalition (the “Coalition”) respectfully submits the following reply comments in response to the Federal Communications Commission Order on Reconsideration and Further Notice of Proposed Rulemaking.

The Coalition appreciates the Commission’s turning its attention to this issue and its efforts to restore the public inspection file rules to their original purpose: allowing the public to inspect this important information by requiring television broadcasters to place public file records online. Because of the ubiquity of electronic data processing and the increasing prevalence of internet communication, online publication of the public file records is not only significantly less burdensome than paper file maintenance, but it also provides better and easier access to the public file. In particular, the Coalition strongly supports the Commission’s conclusion that the online public file should include major components of the existing public file, including the political file. We also support the Commission’s proposal that the online file include records of sponsorship arrangements and broadcast resource sharing agreements.

Because of the unique role that broadcasters play in the electoral process, it is essential that the broadcast political file be made part of online public file. Broadcast political advertising plays a critical part in the election processes and can shape democratic outcomes profoundly. Moreover, broadcasters stand to profit considerably from a windfall of political advertising dollars. The political advertising information and disclosures included in the political file furthers the First Amendment’s goal of an informed electorate that is able to evaluate the validity of political advertising messages and hold to account the interests engaged in political advocacy.

A paper-only inspection file is increasingly anachronistic in a world where the vast majority of businesses take advantage of electronic data processing. However, broadcasters

remain obdurately and inexplicably opposed to the inclusion of the political file in any online public file even though many have actively embraced the web as an alternate way to interact with their audiences. Instead, broadcasters argue that even given the significant technological advancements in computerized traffic systems and electronic filing, they should continue to maintain reams of paper and haphazard methods for updating and organizing their political files. These arguments defy logic, not to mention good business sense. Neo-luddism is no defense to the Commission's reasonable efforts to facilitate public access to the political file. Every other industry has recognized that the internet and computers can significantly improve business efficiency. It is high time the broadcasters did as well.

The Coalition also supports much needed improvements to public file data through the submission of broadcaster shared services agreements. Access to shared services agreements is a critical transparency measure that will alert citizens to the existence of local broadcasters' arrangements that may affect the quality, amount and independence of local news and information available in the community. Unless such agreements are available in the public file, it is exceedingly difficult for members of the public, or the Commission, to learn whether particular programming is generated by the station itself or is a product of an agreement with another entity, including a competing broadcast station. Broadcasters present no legitimate reason why shared services agreements should not be included in their public files, particularly given that the Commission and public interest groups agree that these types of agreements warrant more scrutiny – not less.

The Coalition also urges the Commission to adopt a proposal requiring licensees to submit a record of “pay for play” arrangements for inclusion in their online public files. This increased disclosure will help to address the well-documented shortcomings of fleeting, on-air

disclosures. Online records of these arrangements will afford viewers the opportunity to view sponsorship information that they otherwise may miss. Additionally, the information will be useful for academics and watchdog groups seeking to aggregate this information in order to track the prevalence of payola in the broadcast television market.

The broadcast industry opposes public access to “payola lists,” complaining that requiring online identification of sponsored content would place an undue burden on stations that would have to collect information on instances of payola in programming. This argument is not only unfounded, it is very troubling: under the Communications Act and attendant Commission rules, stations *already* are responsible for disclosing sponsored content in the syndicated, network, and locally originated programming that they air. Consistent with these obligations, broadcasters must *already* maintain these records for the purpose of providing on-air disclosure. That some apparently do not already meet this requirement raises broader and more serious concerns about broadcaster compliance with the sponsorship identification rules. For purposes of this filing, we will presume that broadcasters are not engaging in systematic evasion of sponsorship identification rules but currently collect this information as required. To that end, it would not be burdensome to upload these records to the public file.

Finally, the Coalition urges the Commission to reject broadcaster demands that the FCC first form working groups and pilot programs in advance of adopting and implementing these important measures. The FCC should not allow such dilatory tactics to impede the prompt adoption and implementation of online public file rules. This proceeding is over a decade old, and these issues have been discussed at length over multiple comment cycles. There is no cause to delay these proceedings further to re-hash or reconsider the same issues. The Coalition believes that, as the FCC transitions the public file from paper to electronic form, legitimate and

constructive input from all interested parties could accelerate the implementation of these rules and address any technical glitches encountered as the process moves forward. But this input will better serve the interest and needs of the public if it is offered during the process of online public file implementation, rather than as a means of procrastination.

In conclusion, the Public Interest Public Airwaves Coalition urges the Commission to move expeditiously in adopting and implementing public file modernization policies that will increase the accessibility and usability of information that broadcasters are required to make available in their public files

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The Public Interest Public Airwaves Coalition, including the Benton Foundation,<sup>1</sup> Campaign Legal Center, Common Cause, Free Press, Media Access Project, New America Foundation, and the Office of Communication of the United Church of Christ, Inc. (collectively, “PIPAC” or the “Coalition”), respectfully submits the following reply comments in response to the Federal Communications Commission Order on Reconsideration and Further Notice of Proposed Rulemaking (“FNPRM”) in these dockets.<sup>2</sup>

In the FNPRM, the FCC states its commitment to prompt implementation of the online public file. The Coalition appreciates the Commission’s attention to this issue, and its efforts to require broadcasters to place public file records online, thereby returning to “the original purpose

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<sup>1</sup> The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. These comments reflect the institutional view of the Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

<sup>2</sup> *Standardized and Enhanced Disclosure Requirements of Television Broadcast Licensees Public Interest Obligations*, Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Dkt. 00-168, FCC 11-162 (rel. Oct. 27, 2011, Fed. Reg. Nov. 22, 2011).

of the ‘public inspection file’ rules, which was to allow the ‘public’ to ‘inspect’ this important information.”<sup>3</sup>

This proceeding opened in 2000. In the decade that has followed, broadcasters adamantly have opposed an online public file requirement, conjuring any number of concerns – many misplaced if not manufactured – to discourage meaningful reform. As the Commission prudently acknowledged in the FNPRM, many of those concerns have proven unfounded. The ubiquity of electronic data processing, coupled with the increasing prevalence of internet communication, makes online publication of the public file records significantly less burdensome than paper file maintenance. More importantly, it fulfills the primary purpose of the public file, which is to provide the public with better and easier access to information crucial to its interests.

**I. The Online Public File Should Contain Records That Will Enable The Public To Assess Whether Licensees Are Complying With Their Public Interest Obligations And FCC Rules**

As the Coalition demonstrated in its initial comments, the public file is critical to ensuring that the broadcast system functions in a manner consistent with the public interest, convenience and necessity. Access to public file information promotes meaningful public participation in the broadcast licensing process, and assists in the enforcement of FCC policies and regulations. The Coalition supports the Commission’s conclusion that the online public file should include major components of the existing public file, including the political file. We also support the Commission’s proposal suggesting that records of sponsorship arrangements and broadcast resource sharing agreements should be included in the online file.

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<sup>3</sup> See *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, FCC Staff Report, GN Docket 10-25 (rel. June 9, 2011) at 348 (“INC Report”).

Broadcasters largely do not oppose, and in many cases support the Commission's decision to host a unified online public file.<sup>4</sup> In its comments the National Association of Broadcasters acknowledges that

we live in a world dominated by digital technology. NAB agrees with the Commission that a re-examination of the rules governing the public inspection file is again useful in light of changing technology and consumer habits. The requirement that stations maintain a local public inspection file, usually still as a paper file, appears increasingly outdated.<sup>5</sup>

However, despite the obvious benefits to both broadcasters and the public of internet-accessible files, a number of broadcasters oppose the inclusion of the political file in such a requirement. Additionally, some broadcasters oppose Commission proposals to improve the data in the public file by requiring submission of broadcaster shared services agreements and sponsorship identification lists.

Below we address industry opposition to these important measures and demonstrate that many of these concerns are misplaced, while related claims are either overstated or completely

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<sup>4</sup> See, e.g., Comments of Hubbard Broadcasting Inc., filed MB Dkt 00-168 (Dec. 21, 2011) at 1 (“HBI Comments”) (“HBI supports the Commission’s efforts to expand public access and transparency for public inspection documents by use of the Internet.”); Comments of the Association of Public Television Stations and the Public Broadcasting Service, filed MB Dkt 00-168 (Dec. 22, 2011) at 1 (“APTS/PBS Comments”) (“agree[ing] that hosting much of the public inspection file on the Commission’s website will improve the public’s access to information that helps facilitate dialogue between broadcast stations and the communities they serve, in a manner that will be more efficient for the public and less burdensome for broadcasters.”)(internal quotations omitted); Comments of the National Association of Broadcasters, filed MB Dkt 00-168 (Dec. 22, 2011) at i (“NAB Comments”) (“the National Association of Broadcasters (NAB) agrees with the Commission that advances in digital and IP technology now make it more feasible to host a significant portion of television stations’ public files online. We also agree that placing portions of those public files into an online database has merit.”); Comments of the Joint Broadcasters, filed MB Dkt 00-168 (Dec. 22, 2011) at 1 (“Joint Broadcaster Comments”) (“The Joint Broadcasters support the Commission’s interest in trying to match technological ‘fixes’ to regulatory concerns.”)

<sup>5</sup> NAB Comments at 4.

unfounded. We also address broadcast industry implementation proposals which, while styled as collaborative initiatives, appear to be little more than efforts to impede or delay the FCC's attempts to bring public file obligations into the 21<sup>st</sup> century.

**A. The Political File Is A Vital Component Of The Public File And Should Be Made Available Online**

Broadcast political advertising plays a critical role in the election process and, for better or for worse, can shape election outcomes profoundly. Broadcasting, and broadcast television in particular, is the most popular medium for political advertising, securing an estimated \$2.29 billion in political advertising 2010.<sup>6</sup> 2012 is slated to be nothing short of a “windfall” year<sup>7</sup> with some analysts predicting that political ad spending will jump “30 percent from four years ago—possibly reaching \$4 billion—with the bulk of expenditures going to local television outlets.”<sup>8</sup>

Because of broadcast television's popularity with political advertisers and the unique role that broadcasters play in the electoral process, it is essential that the broadcast political file is made part of the unified online public file. The Sunlight Foundation points out that “[l]ittle is more fundamental to the functioning of our democracy than voters' understanding of who is

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<sup>6</sup> New Release, *New PQ Media Report: Actual U.S. Political Media Spending Hit Record \$4.55 Billion in 2010, Up 8% from 2008 & 45% versus 2006, Despite Lack of Presidential Election*, (Dec. 15, 2010) <http://www.pqmedia.com/about-press-20101215-pcms2010.html>.

<sup>7</sup> Paul Thomasch and Lisa Richwine, “TV broadcasters enjoy spoils of political wars,” REUTERS (Jan. 7, 2012) <http://www.reuters.com/article/2012/01/07/us-advertising-politics-idUSTRE8060AE20120107> (“Around 85 percent of the money that is raised and spent on advertising historically goes toward local broadcast TV. In 2012, that could total between \$2.5 billion to \$3.0 billion, said Ken Goldstein, president of Kantar Media's Campaign Media Analysis Group.”)

<sup>8</sup> D.M. Levine, “Shot in Arm Expected for 2012 Political Ad Spend: MediaVest report expects big jump after slow start,” ADWEEK (Dec. 27, 2011) <http://www.adweek.com/news/television/shot-arm-expected-2012-political-ad-spend-137283>.

influencing our elections. Broadcasters are in the position of making this information readily available to the public by placing the contents of its political file online.”<sup>9</sup>

The Supreme Court long has held that “[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.”<sup>10</sup> Specifically, the Court has upheld broadcast regulations that further the “First Amendment goal of producing an informed public capable of conducting its own affairs.”<sup>11</sup> The political advertising information and disclosures included in the political file further the First Amendment’s goal of an informed electorate that is able to evaluate the validity of political advertising messages and hold to account the interests that disseminate political advocacy. In short, a voter will be better equipped to assess the validity of the *message* if she is better informed regarding the identity of the *messenger*.

By placing the political file online, the FCC will enhance the public’s understanding of who is purchasing political advertising time on broadcast television, how much they are spending, and which local communities their message targets. As the Brennan Center for Justice states in its comments, by moving the political file online the Commission is “poised to take the lead on transparency of some of the most influential political spending. If robust disclosure rules are put in place, it will be a victory for the public, who has a right to know who is paying for the multitude of political ads that have become a fundamental part of every political campaign.”<sup>12</sup>

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<sup>9</sup> Comments of The Sunlight Foundation, filed MB Dkt 00-168 (Dec. 22, 2011) at 1 (“Sunlight Comments”).

<sup>10</sup> *Buckley v. Valeo*, 424 U.S. 1 at n. 55 (1976).

<sup>11</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 (1969).

<sup>12</sup> Comments of The Brennan Center for Justice, filed MB Dkt 00-168 (Dec. 22, 2011) at 3. (“Brennan Center Comments”).

In disputing the need for online access to the political file, some broadcast commenters ignore the benefits to the public of placing the political file online. Instead they myopically focus on the interests of candidate and campaign staff in accessing the public file. For example, State Associations oppose online posting of the political file “because it will add substantial new burdens on television broadcasters and such action has not been shown by candidates or their committees to be necessary.”<sup>13</sup> They further assert that “placing political files online is not necessary for candidates to continue to enjoy their full rights under applicable provisions of the Communications Act and the FCC’s rules and regulations,” because “these sophisticated parties know their rights and how to enforce them.”<sup>14</sup>

Notwithstanding the fact that candidates also deserve the enhanced convenience provided by online access to these records,<sup>15</sup> members of the public have a separate and equally important interest in ensuring that broadcasters fulfill their political disclosure and advertising

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<sup>13</sup> Comments of State Associations, filed MB Dkt 00-168 (Dec. 22, 2011) at 5 (“State Ass’ns Comments”). Alternatively, State Associations ask the FCC to defer its decision on the political file pending the Commission’s decision in its proceeding to replace broadcasters’ issues programs lists with a standardized and modernized form. This argument too fails to present any legitimate reason for delaying an issue under consideration for over a decade. Rather, it seems the sole purpose of such a proposal is simply to delay meaningful access to records that broadcasters must, in any event, already make available to the public. While the proceeding on standardized reporting is a related one, the proposal that stations be required to report on the amount of “electoral affairs programming” is entirely different from requiring them to make available via the internet the information they already collect and maintain on “paid political advertising.” *See Standardizing Program Reporting Requirements for Broadcast Licensees*, Notice of Inquiry, MB Docket No. 11-189, FCC 11-169 (rel. Nov. 14, 2011) at ¶ 20.

<sup>14</sup> State Ass’ns Comments at 10-11.

<sup>15</sup> *See* Comments of LUC Media, filed MB Dkt 00-168 (Dec. 21, 2011) at 7 (“[P]eople interested in a station’s political file may not live within the station’s viewing area. Shouldn’t a U.S. Senate candidate in a state that has multiple media markets—for example, Georgia—be entitled to inspect a station’s political file even if the candidate lives in a different media market. Media buyers such as LUC Media often buy time for candidates from coast to coast. And news organizations often have interests in election contests outside their local media market.”).

responsibilities.<sup>16</sup> In the FNPRM, the Commission notes that “the public is entitled to ready access to these important files.”<sup>17</sup> The Brennan Center agrees that members of the public will benefit from direct online access to these records, and points out that better access to political files also will “allow[ ] researchers, journalists, and public interest organizations to monitor spending on the political advertisements that seek to influence elections—and thus to inform citizens about the groups and individuals that seek to influence their votes.”<sup>18</sup>

### **1. Broadcasters Greatly Overstate The Burdens Of Putting The Political File Online**

Broadcasters cannot counter the mountain of evidence on the public and societal benefit of ready access to the online political file with nothing more than specious claims that placing the political file online would be too onerous.<sup>19</sup> They provide no reason why the FCC should ignore the significant technological advancements in computerized traffic systems and electronic filing. Instead broadcasters argue that local TV stations should continue to maintain reams of paper and haphazard methods for updating and organizing their political files. These arguments strain credulity, not to mention good business sense. In any event, neo-luddism is not a legitimate defense to the Commission’s reasonable efforts to modernize public access to the political file.

A number of broadcasters oppose the online posting of the political file because they say they do not use, or do not consistently use, electronic means to manage their files, but instead create or maintain all or parts of the political file via handwritten or hard copy documents.<sup>20</sup> For

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<sup>16</sup> See, e.g., Petition for Reconsideration of Campaign Legal Center *et al.*, filed MB Dkt 00-168 (April 14, 2008).

<sup>17</sup> FNPRM at ¶23.

<sup>18</sup> Brennan Center Comments at 2.

<sup>19</sup> NAB Comments at 8.

<sup>20</sup> See, e.g. Joint Broadcasters Comments at 4; State Ass’ns comments at 6; NAB Comments at 18.

example, in a joint filing the state broadcast associations in North Carolina, Virginia, and Ohio assert that one of their member stations uses “handwritten documents for approximately 90% of its political file.”<sup>21</sup>

To actually maintain these important records in such an inconsistent and haphazard fashion, particularly in light of widely available and far more efficient electronic means, seems imprudent, if not lax. We suspect that these broadcasters are overstating their reliance on non-electronic means to maintain their political files and other business concerns. Indeed, a number of commenters and observers of this proceeding have pointed out that broadcasters’ apparent resistance to modernizing their filing practices is untenable. As Common Frequency so aptly put it, “[n]early every other business matter in the modern world has been moved to computer for the added efficiency of operation. If a filing cabinet somehow provided greater efficiency, filing cabinets would be ubiquitous over modern electronic data storage.”<sup>22</sup>

At any rate, it is capricious to allow broadcasters’ inexplicable and obdurate choice to rely on outmoded and inefficient methods of maintaining their files to thwart the Commission’s attempts to make the political file more accessible to the public. As Steven Waldman, lead author of the FCC’s staff report on the Information needs of Communications, observed, “most of the rest of the world has figured out ways to use the Internet to reduce workload and cost. I’m not sure the broadcasters want to take the position that they will be the one industry that can’t possibly be expected to use the Internet to improve efficiency.”<sup>23</sup>

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<sup>21</sup> Comments of North Carolina, Ohio and Virginia Broadcasters, filed Mb Dkt 00-168 (Dec. 22, 2011) at 9 (“NC/OH/VA Broadcasters”).

<sup>22</sup> Comments of Common Frequency, filed MB Dkt, 00-169 (Dec. 22, 2011) at 1-2.

<sup>23</sup> Steven Waldman, “Local TV News, Meet the Internet,” *Columbia Journalism Review* (Dec. 29, 2011) [http://www.cjr.org/campaign\\_desk/local\\_tv\\_news\\_meet\\_the\\_internet.php?page=all&print=true](http://www.cjr.org/campaign_desk/local_tv_news_meet_the_internet.php?page=all&print=true).

Other broadcast commenters admit that they use electronic communications and traffic management systems as part of their political file maintenance, yet still oppose putting the public file online because many electronic transactions use “varied and incompatible electronic formats” that do not facilitate uploading.<sup>24</sup>

As a threshold matter, broadcast stations by and large are sophisticated operations. They employ technicians and engineers to ensure that pictures and sound travel hundreds of miles over the electromagnetic spectrum to reach the TV sets of their audiences. Moreover, a number of local television broadcasters already use the internet to upload video of their local programming. It is highly improbable that station staff do not possess the skills necessary to upload simple documents to the internet, particularly if the documents are already generated and transmitted in electronic form. One commenter in this proceeding already has submitted a presentation describing the capabilities of a currently available electronic public inspection file internet portal, which it claims provides a “facility for organizing and maintaining in electronic paperless format all materials required to be in the Local Public Inspection File.”<sup>25</sup> Further, the FCC has proposed not to require broadcasters “to alter the form of documents already in existence prior to posting them to the online public file at this time,”<sup>26</sup> which means that broadcasters will not initially have to change the formats of the documents they maintain electronically in order to post them online.

Broadcasters argue that even with the use of electronic tools “uploading political file materials entails burdens that far exceed those associated with handling in-person requests for the material” because “station personnel currently need only to direct interested parties to the

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<sup>24</sup> NC/OH/VA Broadcasters Comments at 9.

<sup>25</sup> Comments of Broadcast1Source, filed MB Dkt 00-168 (Dec. 22, 2011).

<sup>26</sup> FNPRM at ¶37.

paper political file, which these parties are free to review.”<sup>27</sup> Such arguments are only tenable if stations currently do not bother to organize their political files at all. But of course, the Commission long has required broadcasters to maintain their paper political files in an orderly manner;<sup>28</sup> thus to do otherwise would be a violation of Commission rules. Assuming broadcasters currently comply with this requirement, they already must download and print out any electronically generated documents and organize them in the paper political file. Conversely, online political files would allow broadcasters simply to upload the very same documents that they presently maintain in electronic format and save themselves the trouble of printing them out and organizing hard copies in their filing cabinets. This change would not add to broadcasters’ current duty to keep their political file updated, and arguably would save station staff time and effort (in addition to saving a significant number of trees).

Finally, Joint Broadcasters argue that existing electronic booking and billing traffic management software “does not come even close to providing broadcasters with the ability to engage in *automated* online posting to their political files.”<sup>29</sup> Similarly, NC/OH/VA broadcasters assert that “political time continues to be sold using a variety of *non-automated* processes, including telephone conversations, handwritten forms, emails, and faxes.”<sup>30</sup>

Broadcasters miss the point by opposing online political file posting simply because current technology does not permit “automated posting” of political files online. Certainly, automatic and instantaneous electronic updating of political files would be desirable if it can be achieved in the future – but automatic updating currently is not possible with paper version of the

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<sup>27</sup> Joint Broadcasters Comments at 6-7, 15.

<sup>28</sup> *Codification of the Commission’s Political Programming Policies*, Order on Reconsideration, 7 FCC Rcd 4611, 4620 (1992).

<sup>29</sup> Joint Broadcasters Comments at 6 (emphasis added).

<sup>30</sup> NC/OH/VA Broadcasters Comments at 9 (emphasis added).

file, so we fail to see how this point is relevant with regard to the online file. And, while we understand that broadcasters might prefer not to exert any effort at all to update their political files, the Commission has not suggested that complete automation is a goal that is expected to, or must, be attained in the present proceeding. Nor must the Commission eliminate any and all broadcaster filing obligations in this proceeding. It suffices to say that broadcasters already must comply with the existing paper filing requirements. An online political file would not add to their responsibilities – rather such a requirement would help streamline and standardize these current filing practices to the benefit of both broadcasters and the public.

## **2. Placing The Political File Online Furthers The First Amendment Goal Of An Informed Electorate**

A single commenter opposes the online publication of the political file based on First Amendment grounds. The National Religious Broadcasters (NRB) argue that requiring this information to be put online would impose a “‘chilling effect’ . . . on citizens participating in political campaigns” thereby burdening political speech.<sup>31</sup> These arguments are incorrect.

The FCC has not proposed to change the substance of the political file; it has simply proposed to make it more accessible. The NRB does not contend that the present political file disclosure requirements violate the First Amendment. Nevertheless, the NRB asserts that merely requiring this very same information to be made available via the internet is unconstitutional, citing the privacy interests of organizations and individuals that purchase, or seek to purchase political advertising time.<sup>32</sup>

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<sup>31</sup> Comments of the National Religious Broadcasters, filed MB Dkt, 00-168 (Dec. 15, 2011) at 11 (“NRB Comments”).

<sup>32</sup> *Id.* at 12.

Broadcasters' political file obligation is a longstanding one. Since 1944, the public and campaign staff have had the right to inspect the contents of the political file, including identifying information regarding the executives or members of the boards of directors of corporations and groups purchasing issue advertising.<sup>33</sup> To suggest that the information contained in the *public file* is somehow "private" is to misunderstand the very purpose of the file itself. The purpose of the *public file* is to "make *information to which the public already has a right* more readily available."<sup>34</sup> The information disclosed in the political file is not private, but rather constitutes part of the cost of using the public airwaves to advocate on a political or controversial issue of public importance.<sup>35</sup> This requirement applies irrespective of the interested party's particular stance on an issue.

NRB's argument that the disclosure of interests seeking to persuade voters will produce a chilling effect on speech is likewise meritless. The courts generally have embraced political disclosure as promoting speech and discussion – not chilling it. For example, a U.S. court of appeals recently upheld state provisions requiring disclosure of the identities of a political action committee's executive committee, as well as the identities of its donors, finding that such disclosures "neither erect a barrier to political speech nor limit its quantity. Rather, they promote

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<sup>33</sup> *Announcement of Sponsored Programs*, 9 Fed. Reg. 14734 (Dec. 12, 1944).

<sup>34</sup> *Report and Order in Docket No. 14864* at 1666 (citing, e.g., *Senate Report No. 690*, 86th Cong., 1st Sess., to accompany S. 1898, "New Pre-Grant Procedure" (Aug. 12, 1969) page 2) (emphasis added).

<sup>35</sup> The NAB makes the unrelated though somewhat similar argument that putting the political file online will reveal "commercially sensitive information" regarding advertising rates which will put broadcasters at a disadvantage vis-à-vis cable operators who are not required to put their public files online. *NAB Comments* at 21. PIPAC does not believe that broadcasters will face undue commercial harm given that this information is in fact already public. Under the current public file regime anyone, including cable operators (and other broadcasters for that matter), may visit a station's political file and examine this information. And while we agree with the NAB that ultimately it is preferable for cable operators to also make these records available via the internet, we do not think the Commission must address cable public file requirements concurrent with its actions here.

the dissemination of information about those who deliver and finance political speech, thereby encouraging efficient operation of the marketplace of ideas.”<sup>36</sup> Similarly, the Supreme Court in *Citizens United* upheld transparency provisions of the Bipartisan Campaign Reform Act (BCRA) finding that “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”<sup>37</sup> The Court specifically addressed the benefits of online access to such information, stating that “[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”<sup>38</sup>

NRB’s generalized and speculative claims of increased retaliation against members of advocacy groups seeking to purchase political advertising time as a consequence of online access to broadcasters’ political file is similarly unconvincing. Information on the groups that purchase political advertising on broadcast television has been part of the public file for decades, yet NRB does not point to one instance of harassment or retaliation as a consequence of its public availability.

Vague claims of reprisal provide no basis to agree with facial challenges to disclosure provisions. The Supreme Court normally has required parties requesting anonymity to show a “reasonable probability that the group’s members would face threats, harassment, or reprisals if

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<sup>36</sup> *National Organization for Marriage v. McKee*, 649 F.3d 34, 40 (1st Cir. 2011). In that case the state disclosure laws in question required any political action committee (PAC) to register and “supply a name and address for the PAC; identify its form of organization and date of origin; name its treasurer, principal officers, and primary fundraisers and decision makers; and indicate which candidates, committees, referenda, or campaigns it supports or opposes,” and also to “report any contribution to the PAC of more than \$50 (including the name, address, occupation, and place of business of the contributor).” *Id.* at 42.

<sup>37</sup> *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 916 (2011).

<sup>38</sup> *Id.*

their names were disclosed.”<sup>39</sup> The NRB has not offered any particularized threats of harassment against leaders of advocacy groups that purchase advertising time. It certainly offers no evidence of particularized threats to the constituency it actually represents – religious broadcasters. Accordingly, it provides the Commission with no reason to prevent the political file from effectuating its intended purpose.

Including the political file as part of the unified online public file is a critical step forward in increasing the availability and transparency of the interests using the public airwaves to persuade the electorate. Voters need this information to participate in democratic processes and to make more informed choices about how they may cast their votes. Providing this information would not impose significant burdens on broadcasters, and would further the First Amendment goal of making an “informed public capable of conducting its own affairs.”<sup>40</sup>

#### **B. The Public Should Have Online Access To Broadcasters Shared Services Agreements**

In its initial comments, the Coalition explained that access to broadcasters’ shared services agreements is a critical transparency measure that will alert citizens to the existence of local broadcasters’ arrangements that may be affecting the quality, amount and independence of local news and information available in the community. Nevertheless, both the Joint TV Broadcasters and the NAB oppose any requirement to submit shared services or other similar contractual relationships in the online public file. The Joint TV Broadcasters object to the proposal on the grounds that there is no “cognizable countervailing public benefit” to requiring

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<sup>39</sup> *Id.* (citing *McConnell v. FEC*, 540 U.S. 93, 198). There the Supreme Court rejected facial challenges to BCRA on the basis of *Citizens United*’s vague claims of reprisal. *See also Buckley v. Valeo*, 424 U.S. at 74.

<sup>40</sup> *Red Lion Broadcasting*, 395 U.S. at 392.

submission of SSAs.<sup>41</sup> Joint TV Broadcasters also assert that requiring SSAs to be disclosed raises First Amendment concerns and suggest that SSA documents contain proprietary information.<sup>42</sup> The NAB argues that the inclusion of these contracts is “premature.”<sup>43</sup>

Impressive though a “kitchen sink” approach to opposing the inclusion of SSAs may be, the broadcasters’ arguments hold little water. Citizen concerns regarding SSAs are not premature; they are well-documented. Likewise, disclosure of SSAs themselves is not premature, but rather long overdue. For sometime now public interest and local citizens groups have been seeking greater transparency for SSAs on the grounds that the use of these types of agreements may be adversely impacting the amount and quality of independently produced broadcast news programming available to local residents. Free Press, a member of the Coalition, has compiled a list of sharing arrangements across the country and provided video showing how these agreements have resulted in the airing of carbon-copy newscasts across multiple – and ostensibly competing – local TV stations.<sup>44</sup>

Citizens and activists are documenting the negative impact of shared services agreements on the local media environment, but because SSAs are not currently disclosed members of the public frequently are prevented from viewing the underlying agreements.<sup>45</sup> Media Reform South Carolina, a local citizen group studying the consolidation of newscasts by two local television stations in Charleston, reports that it visited stations to review their public files but could not find

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<sup>41</sup> Joint TV Broadcasters Comments at 11-14.

<sup>42</sup> *Id.*

<sup>43</sup> NAB Comments at iii, 29.

<sup>44</sup> See “Change the Channels” <http://www.savethenews.org/changethechannels> and <http://www.youtube.com/watch?v=0ZXqAl-acic&feature=relmfu>.

<sup>45</sup> In many cases, members of the public only learn of SSAs as result of press reports. In other cases, local residents may be completely unaware that local broadcasters have entered into an SSA even while the agreement impacts what they see on their local TV newscasts.

information on their news sharing agreement. Instead they were told that “the news sharing agreement had never been in the public file but was treated like any other agreement with a vendor who served the station – like the agreement with the company who takes out their trash.”<sup>46</sup>

But news sharing agreements are not mere “vendor” agreements. Shared services agreements (like LMAs and JSAs, both of which are already mandatory parts of the public file<sup>47</sup>), affect control of the station, as well as production of local news and other programming.<sup>48</sup> To this end, the Commission previously has found that public file disclosure of LMAs is necessary to subject these types of agreements to “scrutiny by competitors, the public, and the Commission.”<sup>49</sup>

Likewise, the Commission and public interest groups agree that SSAs warrant more scrutiny – not less. In 2009, a local citizen group Media Council Hawai’i filed an FCC complaint regarding the use of shared services agreements between three Honolulu TV stations, which resulted in the virtual simulcast of local news programs across those stations.<sup>50</sup> In November 2011 the Media Bureau released an order denying the Media Council Hawai’i complaint, but finding that the “net effect” of some types of sharing agreements may be “clearly at odds with

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<sup>46</sup> Comments of Media Reform South Carolina, filed MB Dkt 00-168 (Dec. 16, 2011).

<sup>47</sup> PIPAC Comments at 19-21.

<sup>48</sup> *Id.* at 19.

<sup>49</sup> *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; and Reexamination of the Commission's Cross-Interest Policy*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097, ¶49 (2001).

<sup>50</sup> *See Media Council Hawai’i Complaint and Request for Emergency Relief Regarding Shared Services Agreement between Raycom Media and MCG Capital for Joint Operation of Television Stations KHNL, KFVE, and KGMB, Honolulu, Hawai’i* (Oct. 7, 2009); *see also* [http://www.youtube.com/watch?v=7M\\_0jo-XR\\_A](http://www.youtube.com/watch?v=7M_0jo-XR_A).

the purpose and intent of duopoly rule,”<sup>51</sup> and the Commission has since sought comment on how it should assess SSAs under the its attribution rules.<sup>52</sup> Furthermore, the Commission determined that “consideration of the impact [shared services] agreements have on competition and diversity may be relevant in determining whether license renewal for one or either of the stations that are the subject of the transaction would be consistent with the public interest.”<sup>53</sup>

Because the broadcast license renewal system places “near-total reliance on petitions to deny as the means to identify licensees that are not fulfilling their public interest obligations...to deprive interested parties [ ] of the vital information needed to establish a *prima facie* case in such petitions seems almost beyond belief.”<sup>54</sup> It would be patently unfair and contrary to the purpose of the public file to deny citizens the opportunity to view broadcaster arrangements that affect quality and content of programming offered by local broadcasters, as well as those agreements that ultimately may affect control over the station itself.<sup>55</sup> Disclosure of such agreements would generate the very real benefit of providing the public with the exact

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<sup>51</sup> *In the Matter of KHNL/KMGB License Subsidiary, LLC and HITV Subsidiary Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 2011 WL 5910495 (Nov. 25, 2011) at ¶23 (“KNHL/KMGB Order”).

<sup>52</sup> *See 2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, FCC 11-186, MB Dkt 09-182 (rel. Dec. 22, 2011) at ¶ 194.

<sup>53</sup> *KNHL/KMGB Order* at ¶15.

<sup>54</sup> *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1441 (D.C. Cir 1983).

<sup>55</sup> “In determining whether an unauthorized transfer of control has occurred, the Commission looks to any acts or agreements vesting in a “new” entity the right to determine basic policies concerning the operation of the station. The Commission’s analysis “transcends formulas, for it involves an issue of fact which must be resolved by the special circumstances presented,” and must be determined on a case-by-case basis. However, the focus of any Commission inquiry with respect to the locus of control of a station’s operations focuses on programming, personnel, and finances.” *KNHL/KMGB Order* at ¶16.

information it needs to unearth abuses or outright violations of FCC rules, and to establish a *prima facie* case in complaints to the FCC.

The Joint TV Broadcasters' arguments that disclosure of such agreements would mean the disclosure of proprietary information are incorrect. The current FCC rules allow broadcasters to redact confidential information from LMAs and JSAs before they are submitted in the public file. The Commission could similarly allow broadcasters to redact confidential information from SSAs prior to online republic file submission, and has raised this issue in the FNPRM.<sup>56</sup> Thus, this is not a genuine impediment to SSA disclosure.

The Joint TV Broadcasters' assertion that disclosure of SSAs would raise constitutional problems also is meritless. Joint TV Broadcasters base their First Amendment claim on the ambiguous and unsupported statement that such disclosure would potentially "entangle the FCC" in "licensee program selection."<sup>57</sup> But nowhere do they explain how the disclosure of shared services agreements would interfere with their freedom of speech or program selection. Moreover, it is difficult from a First Amendment perspective to view disclosure of SSAs differently from the disclosure of LMAs and JSAs, both of which concern licensees' arrangements to share programming and advertising time with other entities, and both of which broadcasters have a longstanding obligation to disclose in their public files. In any event, consistent with the broad recordkeeping authority granted by the Communications Act, the courts have upheld the public file submission of myriad broadcaster documents that touch upon broadcaster programming choices, including the longstanding issues/programs lists.<sup>58</sup>

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<sup>56</sup> FNPRM at ¶35.

<sup>57</sup> Joint TV Broadcasters Comments at 12.

<sup>58</sup> See *Office of Communication of United Church of Christ*, 779 F.2d at 1441 (rejecting an FCC decision to eliminate the requirement that stations include in their renewal applications any

(continued on next page)

Broadcasters remain ultimately responsible for the content and the nature of programming aired by their stations,<sup>59</sup> and viewers have a vested interest in the amount, quality and content of programming offered by local broadcasters, as well as in ensuring that licensees are not using sharing agreements to circumvent the letter or the spirit of FCC rules. Unless such agreements are available in the public file, it will remain exceedingly difficult for members of the public, or the Commission, to learn whether particular programming is generated by the station itself or is a product of an agreement with another entity, including a competing broadcast station.

**C. Payola Should Be Disclosed In The Online Public File In Addition To On Air Disclosures Currently Required**

In our initial comments, the Coalition highlighted the increased use of payola in news and information programming and encouraged the FCC to adopt the recommendation of the Information Needs of Communities Report, which proposed requiring licensees to submit a record of “pay for play” arrangements for inclusion in their online public files.<sup>60</sup> Specifically, when a broadcaster airs programming that would require an on-air disclosure under the FCC sponsorship identification rules, the licensee should also post that information in the online public file for a period of five years following the air-date of the related content. This increased disclosure will help address the many shortcomings of fleeting, on-air disclosures. Online

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(footnote continued)

information about their program efforts on the grounds that that the public “possesses an unassailable right to participate in the disposition of valuable public licensees, free of charge, to public trustees. We will not allow this right to be undermined indirectly by the Commission’s inadequately explained refusal to require licensees to make available information on their issue responsive programming.”)

<sup>59</sup> See, e.g., *Petition for Issuance of Policy Statement or Notice of Inquiry on Part-Time Programming*, Policy Statement, 48 Rad. Reg. 2d (P & F) 763, 109, ¶3 (1980) (a licensee retains “ultimate responsibility for programming broadcast over his facility.”)

<sup>60</sup> See PIPAC Comments at 24-26.

records of these arrangements will afford viewers the opportunity to view sponsorship information that they may miss during the live airing of a program.

Additionally, the Coalition has pointed out that the information will be useful for academics and watchdog groups who aggregate this information in order to track the prevalence of payola in the broadcast television market. This benefit has been affirmed by leaders in the journalism field. The Association of Healthcare Journalists supports online disclosure of pay-for-play arrangements in which “marketing masquerades as news” because

[s]uch practices are especially pernicious when applied to matters of health and health care – as they often are – because people make decisions affecting their well-being based on such reports. The result is harm to individuals who make the wrong choices based on biased information and increased costs in the health care system that we all pay for.”<sup>61</sup>

Glenn Frankel, director of the School of Journalism at the University of Texas at Austin, makes the following points in his comments:

the FCC's proposed requirement that TV stations disclose sponsorship deals with companies in return for favorable local coverage is another modest attempt to provide transparency and information to news consumers. Due to shrinking profits, many broadcasters have cut back on the size and ambitions of their news operations, and some corporate sponsors have moved to fill the gap in local news by seeking to dictate news content in return for advertising revenues. This kind of fake news at best is misleading and at worst is outright fraud -- presenting itself as independent reporting when in fact it is bought and paid for by the institution being featured.<sup>62</sup>

Similarly, Sharon Dunwoody, a professor of journalism at the University of Wisconsin-Madison, recognizes the “obvious [ ] value of putting ‘sponsorship identification’ online. . . . local TV

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<sup>61</sup> Comments of the Association of Healthcare Journalists, filed MB Dkt 00-168 (Jan. 11, 2012).

<sup>62</sup> Comments of Glenn Frankel, Director, School of Journalism, University of Texas at Austin, filed MB Dkt 00-168 (Jan. 9, 2012) at 2.

stations already collect and archive this information; online availability will simply make it a bit easier for interested parties to examine these types of evidence.”<sup>63</sup>

# **1. Online Sponsorship Identification Lists Can Help Address Insufficient On-Air Sponsorship Notices**

Despite the documented “obvious” value of putting sponsorship identification information online, the NAB insists that “[t]here is no clear public benefit to including a separate list of all sponsors in the online public file”<sup>64</sup> and claims that “there is no evidence to suggest that the current notice requirements . . . are not sufficient.”<sup>65</sup>

The Coalition respectfully disagrees. Existing on-air sponsorship identification is not sufficient to apprise members of the public when content is the product of a payola arrangement. The Coalition pointed out in its comments that sponsorship identification notices are typically relegated to a small fast-moving scroll at the end of the program credits, are hard to locate on the screen, difficult to decode, too small, and presented for too short a time to read.<sup>66</sup>

These concerns are heightened when payola is incorporated into broadcast news and information programming. While product placement is on the rise in all types of broadcast programming, local news coverage is frequently the last place that members of the public expect to be pitched a covert commercial in the guise of objective journalism. In other words, people expect to see actual “news” in their newscasts – not undisclosed advertisements. And because people rely on news and informational programming to inform a range of decisions, their

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<sup>63</sup> Comments of Sharon Dunwoody, Professor of Journalism, University of Wisconsin-Madison, filed MB Dkt 00-168 (Jan. 9, 2012).

<sup>64</sup> NAB Comments at 23.

<sup>65</sup> *Id.* See also Joint TV Broadcasters Comments at 7-8; Joint Broadcasters Comments at 16-17.

<sup>66</sup> PIPAC Comments at 24 (citing comments submitted in response to MB Dkt No. 08-90, *Sponsorship Identification Rules and Embedded Advertising*, Notice of Inquiry and Notice of Proposed Rulemaking, 23 FCC Rcd 10682 (2008), internal quotation and citations omitted).

inability to ascertain whether information is accurate and unbiased has particularly toxic individual and societal implications.

To this end, online disclosure can provide a useful supplement to the fleeting and frequently insufficient on-air payola disclosure. By making disclosure publicly available in a form that is less ephemeral than current on-air disclosures, access to this information will be increased, which in turn will help to keep viewers informed of the identities of those who seek to persuade them. A viewer who believes she has seen sponsored content, but misses the on-air disclosure, can check a broadcaster's online file to see if the program contained sponsored material, and if so, from whom. Additionally, as per the foregoing and the Coalition's initial comments, a written record of sponsorship can facilitate research and dialogue regarding the growing use of sponsored material, particularly in news and information programming – a goal that is no less important or legitimate in an age where journalism and advertising are increasingly blurred.<sup>67</sup>

## **2. Online Sponsorship Identification Lists Are Consistent With The Commission's Broad Authority To Alert The Public To Broadcasters' Use Of Payola**

Broadcast industry commenters also oppose public access to "payola lists," complaining that requiring online identification of sponsored news and information programming exceeds the Commission's statutory authority and would place an undue burden on broadcasters.<sup>68</sup> These arguments are baseless.

It is well established that the FCC has broad authority under the Communications Act to require records, including records of "programming information where necessary to effectuate

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<sup>67</sup> *Id.* at 26.

<sup>68</sup> *See, e.g.*, Joint Broadcaster Comments at 16-17; Joint TV Broadcaster Comments at 8-10.

the public interest standard.”<sup>69</sup> Section 303(j) of the Communications Act grants the FCC authority “to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable” in the public interest, convenience, or necessity.<sup>70</sup> Accordingly, the D.C. Circuit has held “[t]here is no question but that the Commission has the statutory authority to require whatever recordkeeping requirements it deems appropriate.”<sup>71</sup> More specifically, in enacting section 317 of the Act, Congress instructed the FCC to require broadcasters receiving compensation for airing commercials to disclose the source of that compensation<sup>72</sup> and directed the Commission to “prescribe appropriate rules and regulations to carry out the provisions of this section.”<sup>73</sup> Section 317 specifically mandates that broadcasters make such disclosures “at the time of the broadcast.” Contrary to the arguments of some industry commenters,<sup>74</sup> nothing in the statute itself or in the legislative history even suggests that Congress intended to circumscribe the Commission’s

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<sup>69</sup> See *Policies and Rules Concerning Children’s Television Programming*, Report and Order, 11 FCC Rcd 10660, ¶59 (1996) (finding that “[a]s with on-air identifiers, our broad authority under the Communications Act of 1934 to carry out the public interest requirement permits us to have broadcasters provide programming information where necessary to effectuate the public interest standard during the renewal process. [For example] . . . we have required stations to broadcast certain on-air announcements, to give public notice in a local newspaper for certain broadcast applications and to make available certain information in a public file.”)

<sup>70</sup> 47 U.S.C. §303(j).

<sup>71</sup> *Office of Communication of United Church of Christ*, 779 F.2 at 707.

<sup>72</sup> See *Sponsorship Identification Rules and Embedded Advertising*, Notice of Inquiry and Notice of Proposed Rulemaking, 23 FCC Rcd 10682, ¶4 (2008) (stating that sections 317 and 507 of the Communications Act of 1934 “are designed to protect the public’s right to know the identity of the sponsor when consideration has been provided in exchange for airing programming.”)

<sup>73</sup> 47 U.S.C. §317(a) and (e). Additionally, Section 507 of the Communications Act establishes a reporting scheme designed to ensure that broadcast licensees receive notice of consideration that may have been provided or promised in exchange for the inclusion of matter in a program regardless of where in the production chain the exchange takes place. 47 U.S.C. §508.

<sup>74</sup> Joint TV Broadcaster Comments at 8-10.

ability to require additional disclosures or record keeping requirements that would promote greater transparency of payola.

Moreover, in furtherance of this statutory scheme, the FCC has adopted a number of public file reporting requirements designed to facilitate public notice of sponsored content. For example, under the FCC's sponsorship identification rules stations must maintain a public list of the "chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity" of a corporation or association that has paid or furnished broadcast matter on a political matter or for discussion of an issue of public importance.<sup>75</sup> Similarly, in the case of classified ads, the FCC's sponsorship identification rules direct stations to maintain public file lists "showing the name, address, and (where available) the telephone number of each advertiser."<sup>76</sup>

These examples serve to illustrate that the FCC has adopted a number of reporting requirements in conjunction and in furtherance with the sponsorship identification authority granted by Congress. In this same vein, online public file "payola lists" would advance the purpose and goals of the Communications Act, and the FCC's attendant regulations to better inform the public of who seeks to persuade by disclosing when – and by whom – consideration is offered in exchange for airing particular broadcast content.

### **3. Assuming That Broadcasters Are Currently Complying With Existing Sponsorship Identification Rules, Maintaining An Online Record Of Such Relationships Would Not Be Onerous**

As the Coalition observed in its initial comments, requiring online sponsorship identification lists is a modest proposal that does not call for any alteration to the content that

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<sup>75</sup> See 47 C.F.R. §73.1212(e) "Sponsorship identification; list retention; related requirements."

<sup>76</sup> 47 C.F.R. §73.1212(g)(1).

broadcasters air on television. Nor does the proposal require broadcasters to collect any additional information other than what they must already maintain to ensure compliance with existing rules. Broadcasters merely would be required to document existing disclosures in their online public file. Thus, because they must already maintain these records to comply with current rules, the posting of the records in the online public file would not be onerous.

Nevertheless, a number of broadcasters complain that mandating sponsorship identification would impose an undue burden.<sup>77</sup> Some of these concerns appear to stem from confusion as to whether the FNPRM proposes to require sponsorship identification lists of all programming aired by a station, including syndicated and network programming, or whether such disclosures will be limited to “news programming” as proposed in the Information Needs of Communities Report.<sup>78</sup>

As a threshold matter, we note that use of sponsored material in newscasts is a growing problem that negatively impacts viewers’ ability to assess whether information is the product of objective news reporting. and the Coalition strongly supports online public file disclosure of paid content in news and information program, at a minimum. However, we also believe that it is consistent with existing law and good public policy for the online disclosure requirement to encompass all sponsored programming for which individual stations are responsible. Nor do we believe that this requirement would be unduly burdensome for broadcasters.

The Commission’s sponsorship identification rules already require stations to clearly identify the sponsors of all broadcast programming whether it is syndicated, network, or locally

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<sup>77</sup> See, e.g., NAB Comments at 26-27.

<sup>78</sup> Joint Broadcaster Comments at 17 (citing *INC Report* at 349).

originated.<sup>79</sup> There are clear exemptions to this requirement, including when it is obvious from the context of the content that the material is sponsored,<sup>80</sup> or if the sponsored material appears in a “feature motion picture film produced initially and primarily for theatre exhibition.”<sup>81</sup> Thus, with these exceptions and a few others,<sup>82</sup> broadcasters are ultimately responsible for on-air sponsorship identification information and are required to ensure compliance with the rules, even if the content is not originated by the station itself.

It is for this very reason that Congress enacted section 507 of the Communications Act. Section 507 provides that if money, services or other consideration are provided in exchange for inclusion of certain content for broadcast – regardless of where in the production chain the exchange takes place – then that fact must be disclosed to the station *in advance of the broadcast*, so that the station may broadcast the sponsorship identification announcement required by Section 317 of the Communications Act.<sup>83</sup> Consistent with this obligation, stations must currently track and verify specific sponsorship identification conformity from syndicators and networks ahead of broadcast – or risk violation of the rules. Because stations already receive these records in advance, it would not be unduly burdensome for broadcasters to upload those records as part of the online public file.

The Coalition is concerned by the NAB’s suggestion that stations may not in fact verify such compliance. The NAB states that stations “often only learn that [network and syndicated]

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<sup>79</sup> 47 C.F.R. §73.1212 (a).

<sup>80</sup> *Id.* §73.1212(f).

<sup>81</sup> *Id.* §73.1212(h).

<sup>82</sup> *See, e.g., Applicability of Sponsorship Identification Rules*, Public Notice, 40 FCC 141 (1963) *as modified* 40 Fed. Reg. 41936 (September 9, 1975); *See also Access 1 New Jersey License Company, LLC.*, 26 FCC Rcd 3978, 3982 (Mar. 24, 2011).

<sup>83</sup> *See* 47 U.S.C. §508; *see also* Federal Communications Commission Enforcement Bureau, PAYOLA AND SPONSORSHIP IDENTIFICATION <http://transition.fcc.gov/eb/broadcast/sponsid.html>.

material was sponsored once the programs sponsorship announcement occurs” and, thus, if the Commission adopts an online reporting requirement that encompasses all sponsored programming “stations will need to dedicate personnel to monitoring and identifying network and syndicated programming with sponsorship identification.”<sup>84</sup> The NAB’s burden argument thus is predicated on an admission that TV stations generally fail to observe the requirements of sections 507 and 317, as well as the FCC’s rules. To the extent that broadcasters do not take any steps to ensure observance of the sponsorship identification rules and laws, it raises broader and more serious concerns about broadcaster observance of the sponsorship identification rules. But in any case, it does not justify exempting network and syndicated programming from online payola disclosure.

## **II. The Commission Rules Should Promote Access To And Awareness Of Broadcasters’ Public Files**

The public cannot benefit from the increased access and convenience of an online public file unless it is aware of the file’s existence and location. To that end, the Coalition reiterates that broadcasters that maintain their own websites should be required to provide a prominently displayed “public file” link on the main page of their websites, directing the public to the FCC webpage for the public files. Moreover, broadcasters also should be required to make on-air announcements of the existence of the public file.

APTS/PBS commenters argue that stations should be permitted to rely solely on online disclosure to alert the public to the existence of the online file. APTS/PBS argues that “[o]n-air announcements are an ineffective means to inform the public about the online public file because they are fleeting and not all of the individuals within the community may be watching at the

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<sup>84</sup> NAB Comments at 17.

moment they are aired.”<sup>85</sup> Instead they suggest that online disclosure on the station’s website is “much more likely to be found by persons who are interested in accessing an online public file to learn more about the station may be watching at the moment they are aired” and can provide “more detail than an on-air announcement and can explain exactly which materials are available on the Commission’s website and which are located at the station’s main studio.”<sup>86</sup>

The Coalition agrees with APTS/PBS that internet announcements of the public file have many benefits and should be required. To this end, the Coalition proposes that broadcasters who maintain their own websites should be required to provide a prominently displayed “public file” link on the main page of their websites directing the public to the FCC webpage for the public files. However, we disagree with APTS/PBS that on-air disclosures should not also be required as part of broadcasters’ duty to alert the public to the “existence, location, and accessibility of the station’s public inspection file.”<sup>87</sup> Nor do we believe that stations must choose one form of disclosure over the other. Instead we believe that both online and on-air announcements serve the important goal of alerting the public of its right to visit the inspection file.

It is the Commission’s longstanding practice to require on-air announcements to provide the public with information about station operations. Stations already are required to announce on-air their call signs and identification of their communities of license hourly as well as at the beginning and end of each period of operation.<sup>88</sup> Licensees filing for renewal of a full power station license or for modification, assignment or transfer of a broadcast station license are also

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<sup>85</sup> APTS/PBS Comments at 5.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (citing the FNPRM at ¶ 40).

<sup>88</sup> 47 C.F.R. §73.1201(a)(b)(1).

required to provide on-air announcements.<sup>89</sup> It is logical that members of the public who are interested in a specific station's public file are also likely to be viewers of that particular broadcaster. Accordingly, those community members are likely to be alerted to the existence of the public file through an on-air disclosure.

The Coalition believes that the Commission's determination in 2007 Enhanced Disclosure Order that stations should disclose the existence and location of the public file twice daily, with at least one of the announcements occurring between the hours of 6 p.m. and midnight, would be sufficient.<sup>90</sup> Nor would this requirement unduly burden broadcasters. As noted above, broadcasters are already required to provide hourly on-air station identification announcements; it would not be onerous to supplement these existing notifications twice daily with information on the existence and location of a station's public file.

While we respectfully disagree with some broadcasters with regard to the need for on-air disclosure, we are extremely troubled by other broadcasters whose comments indicate a disinclination to promote or enable public access to their public files. One set of broadcast commenters opposing public announcement of the availability of public file argues that "[s]uch announcements may arouse the public's interest in examining a [public inspection file], but the Licensees do not believe that the Commission should attempt to stimulate such examinations."<sup>91</sup> To the extent that these types of comments indicate the attitude certain broadcasters take with respect to their service to and interaction with the communities they are licensed to serve, it is of

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<sup>89</sup> *Id.* at §73.3580(d)(1)(3).

<sup>90</sup> *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children's Television Programming Report (Form 398)*, Report and Order, 23 FCC Rcd. 1274, ¶31(2007).

<sup>91</sup> Comments of Four Commercial and NCE Licensees, filed MB Dkt 00-168 (Dec. 22, 2011) at 5.

great concern. The purpose of the public inspection file is, of course, to have members of the public inspect the file. But the public's ability to do so is of little use if members of the public are not informed of such a file's existence. To suggest that the Commission does not have an interest, never mind a duty, to ensure that broadcasters alert citizens to the existence of the file, is to undermine the goals of the Communications Act and a well-functioning licensing system.

### **III. The Transition To The Online Public File Should Be Expeditious**

A number of broadcasters propose that the FCC delay adoption of implementation of these rules until it forms a working group to study implementation of the online public file requirement.<sup>92</sup> The Coalition is not opposed to the creation of a working group that would promote timely and orderly implementation of the online public file. We cannot, however, support the formation of a working group the primary effect of which (either deliberately or inadvertently) is to postpone the prompt implementation of the public file. Unfortunately, the working groups proposed by the many in the broadcast industry appear designed to do just that. For example the NAB proposes that the FCC create a broadcaster-only working group and that any transition from paper to mandatory electronic filing should be preceded by "trials or phase-ins."<sup>93</sup> State Associations similarly propose that the FCC conduct a pilot program before adopting online public file rules.<sup>94</sup>

These industry procrastination proposals are unnecessary and unhelpful. The FCC should not allow dilatory tactics disguised as working groups to impede the prompt adoption and implementation of online public file rules. As the Coalition explained, the public and other stakeholders have waited far too long for access to broadcast public files in a manner that reflects

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<sup>92</sup> NAB Comments at Section V.

<sup>93</sup> *Id.* at 35.

<sup>94</sup> State Ass'ns Comments at 12.

the technological realities of the 21<sup>st</sup> century.<sup>95</sup> This proceeding is over a decade old. While the Commission here seeks to refresh an already extensive record, the fact is that many of the issues concerning the migration of the public file from paper form to the internet already have been discussed at length and well-briefed. There is no cause to delay these proceedings further to re-hash or reconsider issues that interested parties have already weighed-in on over the course of many years and multiple comment cycles.

The Coalition believes that, as the FCC modernizes the public file, legitimate and constructive input from all interested parties could help to accelerate the implementation of related rules and address any technical glitches encountered as the process moves forward. But this input will better serve the interest and needs of the public if it is offered during the process of online public file implementation for all broadcasters, rather than as a means of procrastination.

### **Conclusion**

For the reasons stated above, the Public Interest Public Airwaves Coalition urges the Commission to move expeditiously in adopting and implementing public file modernization policies that will increase the accessibility and usability of information that broadcasters are required to make available in their public files.

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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<sup>95</sup> See PIPAC Comments at 2-3 for lengthier discussion of the history of this proceeding.

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